Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1861

ROBERT W. EPP and RAY B. FOSTER,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT	4
CONCLUSION	5
APPENDIX:	
A—Opinion of the Superior Court of New Jersey, Appellate Division	1a
B—Order of the Supreme Court of New Jersey Denying Certification	6a

Cases Cited

Arkansas v. Sanders, 422 U.S. 573 (1979)	2, 4-6
State v. Carpentieri, 168 N.J. Super. 589 (App. Div. 1979) certif. granted 81 N.J. 344 (1979)	5
State v. Mann, 171 N.J. Super. 173 (App. Div. 1979)	5
State v. Pace, 171 N.J. 240 (App. Div. 1979)	5
State v. Parker, 153 N.J. Super. 481 (App. Div. 1977)	5
U.S. v. Calandrella, 469 F.2d 173 (6th Cir. 1979)	5

PAGE

U.S. v. Dien, 609 F.2d 1038 (2nd Cir. 1979) 5

United States v. Schleis, 433 U.S. 905 (1977) on remand 582 F.2d 1166 (8th Cir. 1978) en banc 5

United States Constitution Cited

Fourth Amendment 2, 5

Statutes Cited

28 U.S.C. Sec. 1257(3) 2

N.J.S.A. 24:21-19(a.1) 3

N.J.S.A. 24:21-20(a.4) 3

Rule Cited

N. J. Court Rule R. 3:5-7(d) 4

IN THE

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No. _____

ROBERT W. EPP and RAY B. FOSTER,

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STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioners, Robert W. Epp and Ray B. Foster, pray that a writ of certiorari issue to review the opinion and judgment of the Superior Court, Appellate Division of the State of New Jersey on December 14, 1979.

Opinions Below

The opinion of the Superior Court, Appellate Division, unreported, appears at Appendix A. The Supreme Court of the State of New Jersey denied a petition of certification on February 26, 1980. Appendix B.

Jurisdiction

The opinion of the Superior Court, Appellate Division, of the State of New Jersey was entered on December 14, 1979. A petition for certification of said opinion was denied by the Supreme Court of the State of New Jersey on February 26, 1980.

This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

The defendants vehicle, was stopped and arrested by a State Police Officer while travelling on the New Jersey Turnpike. Subsequent to their arrest, the police officer, without a warrant and absent exigent circumstances, seized and opened the closed luggage of Defendants contained in the car. The question thereby arising is:

1. Does the rationale of *Arkansas* v. *Sanders,* 422 U.S. 573 (1979) apply retroactively thereby rendering the instant warrantless search and seizure illegal?

Constitutional Provision Involved

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of Facts

On February 4, 1977, the defendants were travelling on the New Jersey Turnpike when they were stopped by a Trooper of the New Jersey State Police for an alleged defective brake light. Upon stopping the vehicle and examining the valid driver's license of defendant Epp, the Trooper and defendant Epp went to the rear of the vehicle and engaged in conversation respecting the defective brake light. At said time the officer requested defendant Epp to open the trunk, which he did.

Upon the opening of the trunk, the Officer testified he smelled a strong odor of unburned marijuana. According to the Trooper's testimony, within the trunk were four (4) suitcases and two duffel bags. The Trooper testified that all the articles of luggage were closed and the suitcases were locked. Subsequently, the Trooper observed a green bag sticking out of one of the duffel bags which he pressed against with his hand and heard the crushing of stalks. He then inserted his finger through the bag and pulled out suspected reside of marijuana.

The Trooper then arrested, handcuffed and placed the defendants in the police car. He then searched the glove compartment of the defendants' vehicle and found the keys to the suitcases located in the trunk. A search of the closed luggage was made at the scene which revealed a quantity of marijuana therein. The search of the luggage was made on the New Jersey Turnpike, after defendants were placed under arrest and without a warrant.

The parties were subsequently charged with possession of marijuana and possession of same with intent to distribute contrary to N.J.S.A. 24:21-20(a.4) and N.J.S.A. 24:21-19(a.1).

Procedural History

Subsequent to their arrest, the defendants were indicted for the foregoing violations. Upon entry of not guilty pleas, timely motions to suppress the evidence were filed alleging that said searches were violative of the defendants Federal Constitutional rights. Following an evidential hearing on the motions to suppress, the trial judge issued an order denying said motions. At said hearing defense counsel expressly argued the same rationale which later appeared in the rulings of *Arkansas* v. *Sanders,* 422 U.S. 573 (1979) in support of their request to suppress. Upon a hearing for reconsideration held on January 19, 1979, the trial court affirmed its prior decision.

On January 23, 1979, the defendants, pursuant to N. J. Court Rules R. 3:5-7(d), entered pleas of guilty to the charges while reserving their right to appeal denial of their motions to suppress. The defendants were sentenced to imprisonment for 364 days in the County jail, four months to be served with balance suspended; three years probation; and a fine in the sum of $7,500 payable over the probationary period.

A timely appeal was taken by the defendants to the Superior Court, Appellate Division of the State of New Jersey which affirmed the judgment of the trial court on December 14, 1979. The Appellate Division found the case to be within the rationale of *Arkansas* v. *Sanders,* 422 U.S. 573 (1979) but would not apply the decision retroactively. If it were so applied, the Appellate Court expressly stated the search was illegal.

Review of said decision was requested by the defendants to the State Supreme Court of New Jersey which denied a Petition for Certification to the Superior Court, Appellate Division, on February 26, 1980. Appendix B.

Reasons for Granting the Writ

The decision of the Superior Court, Appellate Division is contrary to the principles of the United States Constitution, Amendment IV as expressed in *Arkansas* v. *Sanders,* 422 U.S. 573 (1979).

In *Arkansas* v. *Sanders,* 422 U.S. 573 (1979) this Court held that in the absence of exigent circumstances, police are required to obtain a Warrant before searching luggage taken from an automobile which had been stopped and searched for contraband. The Superior Court, Appellate Division (Appendix A) expressly held that if *Sanders* is applicable the search and seizure herein was illegal. The Court did not deem it applicable solely because of its opinion on the non-retroactive nature it gave to the *Sanders* opinion, *supra.*

Conflicting opinions exist throughout the country as well as the State of New Jersey with regard to the *Arkansas* v. *Sanders,* 422 U.S. 537 (1979) opinion. *See U.S.* v. *Schleis,* 433 U.S. 905 (1977), on remand, 582 F.2d 1166 (8th Cir. 1978) (en banc); *U.S.* v. *Calandrilla,* 469 F.2d 1973 (6th Cir. 1979); *U.S.* v. *Dien,* 609 F.2d 1038 (2nd Cir. 1979); *Compare State* v. *Pace,* 171 N.J. Super. 240 (App. Div. 1979); *State* v. *Parker,* 153 N.J. Super. 481 (App. Div. 1977); *State* v. *Carpentieri,* 168 N.J. Super. 589 (App. Div. 1979), certif. granted 81 N.J. 344 (1979); *State* v. *Mann,* 171 N.J. Super. 173 (App. Div. 1979).

The most recent opinion in *U.S.* v. *Dien,* 609 F.2d 1038 (2nd Cir. 1979) correctly describes the Court's holding in *Arkansas* v. *Sanders,* 422 U.S. 537 (1979) as merely a clarification and not a change of Fourth Amendment principles.

At the time of the filing of this petition the defendants are in custody serving their sentence solely in consequence of conflicting case law pertaining to the retroactive effect of *Arkansas* v. *Sanders,* 422 U.S. 537 (1979). It would be grossly unfair to deny these defendants the benefit of the Sanders ruling since the arguments made by defense counsel at the initial motion to suppress hearing and predating the Sanders opinion were identical to the U.S. Supreme Court ruling of *Arkansas* v. *Sanders,* 422 U.S. 537 (1979).

By the ruling of the Superior Court, Appellate Division, the narrow question is presented herein: "If Sanders is deemed applicable, this search is illegal" Appendix A p. 3. A ruling in this matter will eliminate the increasing conflict of case law among the Federal and State Judiciary, and the influx of litigation relating to same.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court, Appellate Division of the State of New Jersey.

Respectfully submitted,

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APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—December 14, 1979)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2245-78

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAY B. FOSTER and ROBERT W. EPP,

Defendants-Appellants.

Argued: December 4, 1979—Decided: Dec 14, 1979

Before Judges Kole and Lane.

On appeal from Superior Court, Law Division, Salem County.

Mr. Thomas H. Ward argued the cause for appellant, Ray B. Foster (Messrs. Boakes, Lindsay and Smith, attorneys).

Appendix A

Mr. Daniel A. Zehner argued the cause for appellant Robert W. Epp (Messrs. Zehner & Zehner, attorneys). Mr. Ronald V. Smith, Deputy Attorney General, argued the cause for respondent (Mr. John J. Degnan, Attorney General of New Jersey, attorney).

PER CURIAM

Defendants pleaded guilty to unlawful possession of marijuana and possession thereof with intent to distribute. They appeal solely on the ground that their motion to suppress evidence should have been granted by the trial judge, since the police officer who had stopped the car in which they were travelling unconstitutionally searched luggage contained in the trunk of defendant Epp's automobile without a warrant.

From our review of the proofs at the hearing on the motion to suppress, we are satisfied that the findings of fact by the trial judge are supported by sufficient credible evidence and are therefore unassailable. We have furter concluded that, predicated on such findings, the judge properly held that the search and seizure was constitutional.

Defendants contend that the police officer's claim that he smelled the odor of unburned marijuana did not constitute probable cause for the search of the automobile and that, in any event, there were no exigent circumstances justifying the warrantless search of the suitcases and duffel bags contained in the trunk of the automobile.

This trained police officer's detection of the strong odor of unburned marijuana emanating from the automobile and particularly from the trunk thereof, as well as his observation of cigarette papers in the glove compartment, consti-

tuted sufficient probable cause for him to search the vehicle, including the trunk, for marijuana. He first detected the strong smell of marijuana when the right front door of Epp's automobile was opened but could not pinpoint the source thereof even by a visual inspection of the vehicle's interior. He thus reasonably could have concluded, as he did, that the odor came from the trunk. See, *State* v. *Harrison,* 111 Ariz. 508, 533 P. 2d 1143 (Sup. Ct. 1975); *People* v. *Cook,* 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P. 2d 148 (Sup. Ct. 1975), *cert.* den. 423 U.S. 870, 96 S.Ct. 135, 46 L.Ed. 2d 100 (1975); *Ford* v. *State,* 37 Md. App. 373, 377 A. 2d 577 (Ct. Spec. App. 1977). See also, *United States* v. *Hosch,* 577 F. 2d 963 (5 Cir. 1978); *United States* v. *Thompson,* 558 F. 2d 522, 524 (9 Cir. 1977), *cert.* den. *sub. nom. Reeve* v. *United States,* 435 U.S. 914, 98 S.Ct. 1466, 55 L.Ed. 2d 504 (1978). *Cf. Johnson* v. *United States,* 333 U.S. 10, 13 (1948) in which the court indicated that detection of opium odors by trained individuals could constitute probable cause. Contrast the fact situation in *State* v. *Patino,* 163 N.J.Super. 116, 122-123 (App. Div. 1978), certif. granted 79 N.J. 477 (1979).

There were also sufficient exigent circumstances here under the then law justifying the warrantless search of the suitcases contained in the trunk of Epp's automobile. The thrust of defendant's argument on this issue is that since defendants had been arrested, handcuffed and placed in the patrol car prior to the time the luggage was actualy opened, the luggage and its contents were under the exclusive dominion and control of the arresting officer prior to the search thereof. Thus, it is said, there was no exigency which would justify the subsequent warrantless search.

We agree with the trial judge that *United States* v. *Chadwick,* 433 U.S. 1 (1977) is inapplicable, since under

the facts here the search of the luggage came within the automobile exception to the warrant requirement. In *Chadwick,* the court did not address the issue of the propriety of searching luggage in a moving or readily movable automobile, noting that the government did not contend "that the footlocker's brief contact with Chadwick's car made this an automobile search * * *." 433 U.S. at 11. *Chadwick* simply considered the privacy interests relating to the search of a footlocker, but not in connection with the automobile exception to the warrant requirement. In *Chadwick* the defendants were arrested after the footlocker had been placed into the trunk of a waiting automobile, and while the trunk of the car was still open and the car engine had not even been started. In the present case the automobile itself was used to transport the suitcases containing the contraband. See, *State* v. *Gray,* 59 N.J. 563, 568-569 (1971); *State* v. *McCarthy,* 130 N.J.Super. 540, 543-545 (App. Div. 1974). See also, *State* v. *Murray,* 151 N.J. Super. 300, 308-309 (App. Div.) certif. den. 75 N.J. 541 (1977).

Recently, however, in *Arkansas* v. *Sanders,* —— U.S. ——, 61 L.Ed. 2d 235 (1979) the Supreme Court did hold that once the police had the luggage exclusively within their control, as here, even though it was in an automobile that had been transporting it, the automobile exception did not apply and a warrant was required before the luggage could be searched. It found no justification for the extension of the automobile exception to a warrantless search of the contents of personal luggage merely because it was located in an automobile lawfully stopped by the police. If *Sanders* is deemed applicable to this case, the search and seizure here was unlawful. There is no proof that the police officer feared destruction or removal of evidence from the luggage if a warrant were

first obtained; nor do we find persuasive the State's contention that defendants lacked an expectation of privacy in the luggage since a plastic bag protruded from one of the suitcases. The record does not indicate that the police officer could actually see through the plastic bag or was aware that there was marijuana in it until he actually squeezed the bag.

We hold, however, that, essentially for the reasons expressed in *State* v. *Howery,* 80 N.J. 563 (1979), *Sanders* is not retroactive to a search and seizure which occurred prior to the date of its determination. The search here occurred in February 1977. Compare, *State* v. *Pace,* —— N.J.Super. —— (App. Div. 1979) where the matter of retroactivity of *Sanders* was not discussed and apparently not raised.

We note that the police officer here was alone and reasonably believed that, under the then existing law, given probable cause to search an automobile on the highway even though the defendants were under arrest, exigent circumstances justified the warrantless search of the suitcases here involved. See, *State* v. *Gray, supra; State* v. *McCarthy, supra.* See also, *State* v. *Parker,* 153 N.J.Super. 491, 487 (App. Div. 1977).

We find no indication that our courts anticipated the holding in *Sanders. State* v. *DeLorenzo,* 166 N.J.Super. 483 (App. Div. 1979) and *State* v. *Parker, supra,* relied on by defendants, deal with the search of bags or luggage already secured in police facilities, rather than the search of luggage stored in a car stopped on the highway. They are thus distinguishable from *Sanders.*

Affirmed.

A True Copy

ELIZABETH MCLAUGHLIN
Clerk

APPENDIX B

Order of the Supreme Court of New Jersey Denying Certification

(Filed—February 27, 1980)

SUPREME COURT OF NEW JERSEY
C-463 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RAY B. FOSTER and ROBERT W. EPP,

Defendants-Petitioners.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2245-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of February, 1980.

A True Copy

STEPHEN W. TOWNSEND
Clerk

FILED
AUG 4 1980

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Supreme Court of the United States

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STATE OF NEW JERSEY,

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On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR DENYING CERTIORARI:	
Point I—The facts of record did not permit the formulation of the question stated by petitioners	7
Point II—The instant petition does not present a substantial question for resolution since prior decisions of this Court clearly indicate that Arkansas v. Sanders, supra, and United States v. Chadwick, supra, have no retroactive application to the instant matter	13
CONCLUSION	22

Cases Cited

Almeida-Sanchez v. United States, 413 U.S. 266 (1973)	16
Arkansas v. Sanders, 422 U.S. 573 (1979), 99 S.Ct. 2541	7-14, 18, 20, 21
Bowen v. United States, 422 U.S. 916 (1975)	17
Cady v. Dombrowski, 413 U.S. 433 (1973)	11
California v. Minjores, 24 Cal.3d 410, 591 P.2d 514, 153 Cal. Rptr. 224 (Sup. Ct. 1979), cert. den. —— U.S. ——, 62 L.Ed.2d 117 (1979)	21

PAGE

Carroll v. United States, 267 U.S. 132 (1925) 11, 19, 20

Chambers v. Mahoney, 399 U.S. 42 (1970) 11, 14, 19, 20

Chimel v. California, 395 U.S. 752 (1969) 16

Darrow v. Hanover Township, 58 N.J. 410 (1971), 278 A.2d 200 17

Desist v. United States, 394 U.S. 244 (1969) 14, 18

Johnson v. New Jersey, 384 U.S. 719 (1960) 16, 17

Katz v. United States, 389 U.S. 347 (1967) 12

Kemner v. Texas, —— S.W.2d ——, 25 Cr.L. 3196 (Texas Ct. of Crim. App. 1979) 21

Linkletter v. Walker, 381 U.S. 518 (1965) 16, 18

Mapp v. Ohio, 367 U.S. 643 (1961) 16

Nastu v. State, 589 S.W.2d 434, 26 Cr.L. 2117 (Tex. Ct. Crim. App. October 3, 1979) 21

Rahas v. Illinois, —— U.S. ——, 99 S.Ct. 421 (1979) 12

State v. Barnes, 54 N.J. 1 (1969), 252 A.2d 398, cert. den. 396 U.S. 1029 (1970) 12

State v. Boykins, 50 N.J. 73 (1967), 232 A.2d 141 12

State v. Carpentieri, 82 N.J. 546 (1980), —— A.2d —— 17

State v. Gray, 59 N.J. 563 (1971), 285 A.2d 1 12

State v. Hannah, 125 N.J. Super. 290 (App. Div. 1973), 310 A.2d 512 12

State v. Howery, 80 N.J. 563 (1979), 404 A.2d 632 16-18

State in the Interest of A.C., 115 N.J. Super. 77 (App. Div. 1971), 278 A.2d 225 20

PAGE

State v. Kahlon, 172 N.J. Super. 331 (App. Div. 1980), —— A.2d —— 21

State v. Koch, 118 N.J. Super. 421 (App. Div. 1972), 288 A.2d 295 17

State v. Lueder, 74 N.J. 62 (1977), 376 A.2d 1169 17

State v. McCarthy, 130 N.J. Super. 540 (App. Div. 1974), 328 A.2d 10 12

State v. Murray, 151 N.J. Super. 300 (App. Div. 1977), 376 A.2d 1255 ..... 11, 12

State v. Nash, 64 N.J. 464 (1974), 317 A.2d 689 ..... 16, 17

State v. Naturile, 83 N.J. Super. 563 (App. Div. 1964), 200 A.2d 617 12

State v. Patino, 83 N.J. 1 (1980), —— A.2d —— 17

State v. Smith, 113 N.J. Super. 120 (App. Div. 1971), 273 A.2d 120 20

Stovall v. Denno, 388 U.S. 293 (1967) 16, 17, 21

Texas v. White, 423 U.S. 67 (1975) 11

United States v. Berry, 571 F.2d 2 (7 Cir. 1978) (on rehearing) cert. den. sub. nom. Richardson v. United States, 439 U.S. 840 (1978) 21

United States v. Calandrella, 605 F.2d 236 (6 Cir. 1979) 13, 19

United States v. Chadwick, 433 U.S. 1 (1977) 8-10, 12-14 18, 20, 21

United States v. Choate, 576 F.2d 165 (9 Cir. 1978), cert. den. 439 U.S. 953 (1978) 21

United States v. Dien, 615 F.2d 10 (2 Cir. 1980) 21

United States v. Dioniso, 410 U.S. 1 (1973) 12

PAGE

United States v. Fontecha, 576 F.2d 601 (5 Cir. 1978) 11

United States v. Gooch, 603 F.2d 122 (10 Cir. 1979) 14, 21

United States v. Mackay, 606 F.2d 264 (9 Cir. 1979) 21

United States v. Miller, 608 F.2d 1089 (5 Cir. 1979) 21

United States v. Peltier, 422 U.S. 531 (1975) 15, 17, 18, 20

United States v. Reda, 563 F.2d 510 (1977) 21

United States v. Steward, 595 F.2d 500 (9 Cir. 1979) 21

Williams v. United States, 401 U.S. 646 (1970) 14, 16

United States Constitution Cited

Fourth Amendment 2, 7, 20

Statutes Cited

N.J.S.A. 24:21-19 2

N.J.S.A. 24:21-19(a) 4

N.J.S.A. 24:21-20 ..... 2, 4

N.J.S.A. 24:21-20(2)(4) 4

Rules Cited

R. 3:5-7 7

R. 3:5-7(1), (d) 3

No. 79-1861

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On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Opinions Below

The New Jersey Supreme Court's order denying petitioners' petition for certification appears in petitioners' appendix, at 6a. The opinion of the Superior Court of New Jersey, Appellate Division, not reported, appears in petitioner's appendix, at 1a to 5d.

Statutes and Rules Involved

UNITED STATES CONSTITUTION

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J.S.A. 24:21-19. Prohibited acts A.—Manufacturing, distributing, or dispensing—Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:
(1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance;

* * *

N.J.S.A. 24:21-20. Prohibited acts B.—Possession, use or being under influence—Penalties

A. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act.

* * *

(4) Possession of more than 25 grams of marijuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than $15,000.00, or both; provided, however, that any person who violates this section with respect to 25 grams or less of marijuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person.

New Jersey Rules of Court, R. 3:5-7(1), (d): Motion to Supress Evidence and for Return of Property

(a) Notice; Time. On notice to the prosecutor of the county in which the matter is pending or threatened and to the applicant for the warrant, if the search was with a warrant, and in accordance with the applicable provisions, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply only to the Superior Court or county court of the county in which the evidence was obtained to suppress the evidence and for the return of the property seized even though the offense charged or to be charged may be within the jurisdiction of a municipal court. Such motion shall be made within 30 days after the initial plea to the charge unless, the court, for good cause shown, enlarges the time. A motion made before the trial shall be determined before trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto.

• • •

(d) Appellate Review. Denial of a motion made pursuant to this rule may be reviewed on appeal from a judgment of conviction notwithstanding that such judgment is entered following a plea of guilty.

Statement of the Case

Salem County Indictment No. I-260-76-7, filed on March 25, 1977, charged petitioners herein, Ray B. Foster and Robert W. Epp, with unlawful possession of marijuana, contrary to N.J.S.A. 24:21-20(2)(4), and possession with intent to distribute marijuana, contrary to N.J.S.A. 24:21-19(a), (counts one and two respectively). Petitioners' filed a motion to suppress evidence on November 3, 1978, before the Honorable Norman Telsey, J.S.C. Said motion was denied. Petitioners' motion for reconsideration of the aforementioned order denying the motion to suppress was entertained and denied on January 19, 1979.

The following facts were adduced at the motion to suppress evidence. On February 4, 1977, at approximately 10:30 a.m., New Jersey State Trooper Thomas Schlichtig was patrolling the southern end of the New Jersey Turnpike. Officer Schlichtig was seated in his unmarked patrol vehicle, facing the southbound lane of the thoroughfare when he observed a 1974 Mercury enter the tollgate. (T 9-12 to 16).* The vehicle drove through the toll station and paused briefly at a nearby public telephone booth. As the vehicle slowed to an eventual stop, the officer noted that its left rear brake light was not operational (T9-17 to 21).

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* "T" denotes the transcript of petitioners' motion to suppress on November 3, 1978.

The 1974 Mercury pulled back onto the roadway and Officer Schlichtig pursued the automobile in order to alert the driver that his brake light was inoperable. After pursuing the vehicle a short distance, the officer instructed the driver, petitioner Epp, to pull over onto the shoulder of the northbound lane. (T9-23 to 24). Thereupon, petitioner Epp exited the 1974 Mercury and walked back to the unmarked patrol vehicle. (T12-9 to 11 and T23-8 to 10). Officer Schlichtig requested that Epp produce his driver's license and registration. Epp presented a valid Florida driver's license but remarked that the registration card was in the glove compartment. (T12-13 to 15, T23-14 to 16, T37-19 to 20, T23-21 to 24 and T38-15 to 16).

Epp and the officer walked back to the passenger's side of Epp's vehicle where the latter requested that Foster, who was seated in the right front seat, hand Epp the registration card from inside the glove compartment. (T24-16 to 17). When Foster opened the door, the officer detected the strong, pungent odor of raw, unburned marjuana emanating from the vehicle. As Foster opened the glove compartment, the officer observed a pack of "Job" cigarette papers located therein. Foster retrieved the registration card and handed it to Epp, who in turn presented same to Officer Schlichtig. (T25-2 to 3 and T38-9 to 14).

Although the officer could detect the strong odor of marijuana emanating from the vehicle, his visual inspection of the interior thereof did not disclose the physical presence of the contraband. (T27-5 to 9 and T13-6 to 9). Officer Schlichtig walked with petitioner Epp to the rear of the vehicle and advised the latter that the rear brake light was not functioning. Epp appeared to be surprised. (T39-8 to 9, T13-10 to 12). The officer then requested that Foster, who was still seated in the front seat of the

vehicle, depress the brake pedal. Foster complied and the officer pointed out that the light was indeed not functioning. (T31-16 to 17, T13-13 to 14, T28-7 to 10, T41-16 to 17 and T28-14). The officer then inquired of Epp whether he would open the trunk. Epp replied "Sure". (T13-24).

When the trunk was opened the officer noted a "very strong odor" of marijuana emanating from somewhere inside the trunk. He also observed four suitcases and two duffle bags inside of the trunk. The officer's visual inspection of the trunk disclosed that a green plastic bag was protruding from one of the zipper-type blue suitcases. (T14-2 to 12, T32-15 to 16, T42-12 to 13). Thereupon, the officer pressed down on the suitcases and noted the sound of crackling plant stalks. He therefore reasonably concluded that the odor was apparently coming from the suitcases and the duffle bags. (T13-24 to 25, T14-5 to 6, T35-7, T35-15 to 19 and T14-10 to 14).

Officer Schlichtig requested the keys to the luggage but Epp indicated that he did not have same in his possession. The officer then inserted his fingers into suitcase through the area from which the plastic bag was protruding, broke the plastic bag and removed a substance later identified as marijuana. Epp was then placed under arrest, handcuffed and placed in the front seat of the patrol vehicle. Foster, who had been seated in the automobile during this time, was also placed under arrest. (T14-23 to 25).

The officer then searched the interior of the vehicle and found the keys to the luggage in the glove compartment. A folder containing records of narcotic transactions was discovered on the front seat of petitioner Epp's vehicle. The folder belonged to Foster. Two hundred and seventeen pounds of marijuana were found in the suitcase (which were opened at the scene). (T15-6 to 8, T21-6 to

7, T14-23 to 25, T15-17 to 20 and T19-1). The officer was alone during the entire proceeding. The search of the luggage formed the basis for petitioners' motion to suppress. Said motion was denied.

Petitioners then entered pleas of guilty to the charges, contained in Indictment No. I-260-76-7, pursuant to New Jersey Court Rules R. 3:5-7, while reserving their right to appeal from the denial of the motion to suppress.

In an unpublished opinion filed on December 14, 1979, the Superior Court of New Jersey, Appellate Division, affirmed the convictions below (Pa1 to 5). Petitioners' petition of certification to by the New Jersey Supreme Court was denied on February 27, 1980. (Pa6).

REASONS FOR DENYING CERTIORARI

POINT I

The famts of record do not permit the formulation of the question stated by petitioners.

Relying exclusively on this Court's decision in *Arkansas* v. *Sanders,* 422 U.S. 573 (1979), 99 S.Ct. 2541, petitioners assert that the instant search and seizure of marijuana contravened the Fourth Amendment to the United States Constitution in general, and *Arkansas* v. *Sanders, supra,* in particular. They assert that this Court's decision in that case should be applied retroactively. The State of New Jersey disagrees and asserts that the retroactivity of this Court's decision in *Arkansas* v. *Sanders, supra* is not fairly presented under the facts of the present appeal. As a basic premise, we submit that the retroactivity of any given new exclusionary rule or decision of this Court need not be decided where, as here, the new

principle of law is not clearly implicated. Our position is predicated on the view that *Arkansas* v. *Sanders, supra* and *United States* v. *Chadwick,* 433 U.S. 1 (1977), are factually distinguishable from the case at bar.

It is clear that *United States* v. *Chadwick, supra,* did not involve the automobile exception to the Fourth Amendment's mandate that searches be conducted pursuant to a search warrant issued by a detached magistrate. Indeed, the facts in *United States* v. *Chadwick, supra,* belie the argument presented by petitioners herein. In *Chadwick,* several Amtrak Railroad Officials observed defendants place a footlocker into a Boston-bound train. The officials noted that talcum powder was leaking from the footlocker. This powder was often used to camouflage the odor of marijuana. *Id.* at 2480. The federal authorities were alerted and were waiting for defendants when the latter disembarked in Boston. Although the authorities had probable cause to search the footlocker and in fact, had two days in which to procure a search warrant, they nonetheless waited until the locker was placed into the trunk of an automobile. While the trunk of the vehicle was still open and before the vehicle's ignition was turned on, the police seized the footlocker and arrested defendants. One and one-half hours later, the footlocker was opened in the Boston Federal Building and found to contain marijuana. *Id.* at 2480.

In reviewing the matter, this Court noted that while the Government had sought to justify the search under the automobile exception to the warrant requirement on appeal to the circuit court, the narrow question which was presented on certiorari was whether a search warrant was required before the authorities could open a locked footlocker that was properly in their possession and where the authorities had probable cause to believe that the

footlocker contained contraband. "Accordingly, [that] case present[ed] no issue of the application of the exclusionary rule." *United States* v. *Chadwick, supra* n. 3 at 2481, 2483.

In *Arkansas* v. *Sanders, supra,* the police, acting on an informant's tip that Sanders would be arriving at an airport carrying a green suitcase containing contraband, placed the Little Rock Arkansas Airport under surveillance. Authorities of the local police department observed Sanders as he claimed the suitcase from the baggage service, loaded it into the trunk of a taxicab, entered the vehicle with a companion and rode away from the scene. Shortly Sanders was riding and requested that the taxi driver open the truck of the taxicab. The latter complied. The police then removed the luggage, opened it and discovered 9.3 pounds of marijuana therein. *Arkansas* v. *Sanders, supra* at 2588. Thus, the police had probable cause to believe that the suitcase contained marijuana *before* it was placed into the trunk of the taxicab.

Justice Powell, speaking for a majority of the Court, noted that the case had been accepted by writ of *certiorari* to the Supreme Court of Arkansas "to resolve some apparent misunderstanding as to the application of [the Court's] decision in *United States* v. *Chadwick,* [*supra*], to warrantless search of luggage seized from an automobile." *Id.* at 2588. However, as noted by the Honorable Chief Justice Burger, (concurring), the *Sanders* opinion did not involve the automobile exception to the warrant requirement. This was particularly true since the police had probable cause to search the luggage *before* it was placed into the runk of the taxi cab. See, *Arkansas* v. *Sanders, supra* at 2594 (Burger, C.J. concurring). In *Sanders, supra,* the relationship between the luggage searched and the automobile were "purely coincidental," (as in *Chad-*

wick). *Id.* at 2595. "[Sanders] simply does not present the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located *somewhere* in the vehicle. . . ." (emphasis in original).

The case currently under review presents the question of whether a warrant is required before the authorities may search an automobile in situations where they have *no* advanced notice that a particular person or his luggage contain contraband. Officer Schlichtig noted the strong odor of marijuana emanating from the vehicle when petitioner Foster opened the passenger's door. A subsequent visual inspection of the interior of the vehicle did not disclose the presence of contraband. Operating under a reasonable belief that the contraband could be concealed in the trunk, the officer, with petitioner Epp's consent, opened the trunk of the vehicle. Unable to discern the location of the marijuana, the officer reached into one of the zipper-type suitcases and removed some marijuana. At this point in time, Epp was behind the vehicle's trunk with the officer, but Foster remained inside apparently free to turn the ignition and to remove both the automobile and its contents from the scene. Thus, exigent circumstances existed when the officer reached inside of the baggage. Neither the automobile nor the contents were under exclusive police control. The inherent mobility of the vehicle and therefore, the possible destruction of evidence was clear. (T12-13 to 15; T23-14 to 16; T24-16 to 17; T25-2 to 3; T38-9 to 14; T27-5 to 9; T13-14 to 24; T14-2 to 12; T13-25; T14-23 to 25).

The State of New Jersey thus submits that the instant case under review presents a factual situation which is clearly distinguishable from both *United States* v. *Chadwick, supra and Arkansas* v. *Sanders, supra.* In contrast

to those cases, the police officer in the instant matter did *not* have probable cause to believe that the luggage in question contained contraband independent from the vehicle itself. At the time of the instant search, to wit, when the officer inserted his hand into the zipper-type suitcase, the automobile nor its contents and occupants were under the exclusive control of the authorities. The placing of the luggage in the trunk of the vehicle was not "purely coincidental." Cf. *Arkansas* v. *Sanders, supra* at 2595. The instant search was thus, one of the automobile and *not* a particular parcel located therein. Moreover, the record below indicated that the officer was present at the scene without additional officers, as was the case in both *Sanders, supra,* and *Chadwick, supra.*

In *United States* v. *Fontecha,* 576 F.2d 601 (5 Cir. 1978), the Fifth Circuit upheld the warrantless search of a drug suspect's car, including the unlocked suitcase on the back seat of the vehicle, after an officer stopped the man and his companion when they sped away from a permanent border checkpoint. The court in distinguishing *Chadwick,* concluded that the strong odor of marijuana coming from the vehicle and the exigent circumstances presented, justified the search of the suitcase. The court found that the two-on-one confrontation, involving an automobile, on a desert road was sufficient exigent circumstances to justify the search, judged as of the time the incident occurred and not in light of subsequent events. *Id.* at 2425.

Since the present search involved the automobile exception to the warrant requirement, the search was constitutionally permissible under this Court's decisions in *Carroll* v. *United States,* 267 U.S. 132 (1925); *Texas* v. *White,* 423 U.S. 67, 68 (1975); *Chambers* v. *Mahoney,* 399 U.S. 42 (1970), and *Cady* v. *Dombrowski,* 413 U.S. 433 (1973). See also, *State* v. *Murray,* 151 N.J. Super., 300 306-307

(App. Div. 1977), 376 A.2d 1255; *State* v. *McCarthy,* 130 N.J. Super. 540 (App. Div. 1974), 328 A.2d 10; *State* v. *Hannah,* 125 N.J. Super. 290, 294-295 (App. Div. 1973), 310 A.2d 512; *State* v. *Naturile,* 83 N.J. Super. 563, 568, 573 (App. Div. 1964), 200 A.2d 617; *State* v. *Gray,* 59 N.J. 563, 568-569 (1971), 285 A.2d 1; *State* v. *Barnes,* 54 N.J. 1, 10 (1969), 252 A.2d 398, *cert.* den. 396 U.S. 1029 (1970), and *State* v. *Boykins,* 50 N.J. 73, 81-81 (1967), 232 A.2d 141.

It was not unreasonable to undertake the additional intrusion of a search without a warrant since the automobile, its occupants and contents were *not* exclusively under police control when the officer reached into the zippered luggage. This, coupled with the obvious exigent circumstances, clearly justified the intrusion. See, *Arkansas* v. *Sanders, supra* at 2589, n.3. *Arkansas* v. *Sanders, supra,* and *United States* v. *Chadwick, supra,* having no application to the present case, this Court need not decide the retroactivity of the former case to the case currently under review.* The instant search was thus, constitutionally permissible.

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* We also submit that since the plastic bag was protruding from the suitcase at the time of the instant search any expectation of privacy regarding the contents thereof was severely undermined. See, *Rahas* v. *Illinois,* —— U.S. ——, 99 S.Ct. 421 (1979).

What one knowingly opens to the public even in his own home or office is not subject to Fourth Amendment prohibition. *Katz* v. *United States,* 389 U.S. 347 (1967), *United States* v. *Dioniso,* 410 U.S. 1 (1973).

POINT II

The instant petition does not present a substantial question for resolution since prior decisions of this Court clearly indicate that *Arkansas* v. *Sanders, supra,* and *United States* v. *Chadwick, supra,* have no retroactive application to the instant matter.

Assuming *arguendo* that *Arkansas* v. *Sanders, supra,* is applicable to the current matter under review, we submit that this Court should deny certiorari since its prior decisions in the area of the exclusionary rule clearly mandate that the decision in *Arkansas* v. *Sanders,* is to have prospective effect only. Therefore, no substantial question warranting review by this Court is presented herein.

In an unpublished opinion, the Superior Court of New Jersey, Appellate Division, held that *Arkansas* v. *Sanders, supra,* does not have retroactive application to the present case. The State of New Jersey wholly agrees with that decision. (Pa1 to 5).

The warrantless search of the suitcase in the instant case occurred on February 4, 1977. On June 21, 1977 *United States* v. *Chadwick, supra,* was decided. The *Chadwick* Court held that the warrantless search of a footlocker, as it was about to be placed in the trunk of an automobile, was unconstitutional. On June 20, 1979, *Arkansas* v. *Sanders, supra* was decided. That case held that the warrantless search of a suitcase in the trunk of an automobile was unconstitutional because no exigent circumstances were demonstrated. Both cases of course, were decided subsequent to the search in the instant case. We submit that insofar as both cases *may* have modified accepted law in the area of the Fourth Amendment, they may not be relied upon in determining the reasonableness of the search in the instant case. *United States* v. *Calandrella,* 605 F. 2d 236 (6 Cir. 1979).

That this Court's decisions in *Chadwick, supra* and *Arkansas* v. *Sanders, supra,* significantly modified the application of the exclusionary rule to automobile searches can not be gainsaid. In *Chambers* v. *Maroney, supra,* this Court ruled that it was constitutionally permissible to conduct, predicated upon probable cause, a warrantless search of an automobile and its contents which had been stopped on a public highway. Given the detaining of confining the vehicle in the first instance, no constitutional distinction was perceived between searching it immediately or awaiting the issuance of a search warrant. *Chambers* v. *Maroney, supra* at 52. Although the *Chambers* opinion utilizes the "exigent circumstances" analysis and focuses on vehicular mobility, the case was not decided on the basis that the automobile in question was in fact, capable of being moved at the instant of the search. Indeed, the vehicle was secured at police headquarters at the time it was searched. *Id.* at 44, 52. While the *Chambers* Court observed that "[o]nly in exigent circumstances will the judgment of the police regarding probable cause serve as sufficient authorization for a search," *Chambers, supra* at 51, the Court was apparently concerned about inherent rather than actual vehicular mobility at the time of the search. *Id.* at 52, *United States* v. *Gooch,* 603 F.2d 122, 124 (10 Cir. 1979).

The State emphasizes that *Sanders* and *Chadwick, supra,* have no application to the case currently under review. However, should this Court view the instant matter as an appropriate vehicle to decide the retroactivity of *Sanders, supra,* we offer the following observations. The application of new extensions of the exclusionary rule has been expressly rejected by this Court. See e.g., *Desist* v. *United States,* 394 U.S. 244 (1969), and *Williams* v. *United States,* 401 U.S. 646 (1970). Any conceivable doubt

as to the Court's position on this issue was totally obliterated in *United States* v. *Peltier,* 422 U.S. 531 (1975), wherein the condemnation of roving border patrol searches expressed in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), was accorded no effect to the Peltier case. The Court prefaced its determination, the substantive reasoning of which is considered *infra,* thusly:

> *Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect.* In those cases where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials . . . the doctrine has quite often been applied retroactively. *It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principles would be accorded only prospective application. United States* v. *Peltier, supra* at 535; emphasis supplied; citations and footnote omitted.

The State believes that utilization of the proper standards and, more importantly, appreciation of the fundamental purpose of the exclusionary rule clearly militate in favor of prospective only application of the *Sanders* decision.

Determinations as to the retroactivity of court-fashioned rules of criminal procedure devolve to questions of policy,

for "the constitution neither prohibits nor requires retrospective effect," *Linkletter* v. *Walker,* 381 U.S. 518, 629 (1965) [holding the exclusionary rule announced in *Mapp* v. *Ohio,* 367 U.S. 643 (1961) to have prospective application only]. Accord, *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1960); *State* v. *Howery,* 80 N.J. 563 (1979), 404 A.2d 632, and *State* v. *Nash,* 64 N.J. 464 (1974), 317 A.2d 689. The test for determining the retroactive effect of a court ruling is based on a balancing of individual rights against society's need to protect itself and to maintain a stable system of law enforcement. This has given rise to formulation of the three-pronged standard set forth in *Stovall* v. *Denno,* 388 U.S. 293 (1967). The components of that test are:

> (a) the purpose to be served by the new standard; (b) the extent of the reliance by law enforcement authorities on the old standard; and (c) the effect on the administration of justice of the retroactive application of the new standard. 388 U.S. at 297.

For example, application of these criteria in *Stovall* led the Supreme Court to conclude that prospective treatment was mandated for the narrowed scope of searches incident to arrest established in *Chimel* v. *California,* 395 U.S. 752 (1969). See *Williams* v. *United States,* 401 U.S. 646 (1971).

The most recent Supreme Court cases treating the problem of the retroactivity of constitutional rules governing the rights of criminal defendants have mandated prospective application of procedurally based rules that do not affect proof of the actual elements of the offense charged. The rule of *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), which applied the Fourth Amendment exclusionary standard to roving boarder searches by Border Patrol Agents, has recently been held inapplicable to any

search that occurred prior to the date of that decision. *Bowen* v. *United States,* 422 U.S. 916 (1975); *United States* v. *Peltier,* 422 U.S. 531 (1975).

When addressing the question of retroactivity, the New Jersey Courts have followed the federal criteria. *State* v. *Patino,* 83 N.J. 1 (1980), —— A.2d ——; *State* v. *Carpentieri,* 82 N.J. 546 (1980), —— A.2d ——; *State* v. *Howery, supra; State* v. *Lueder,* 74 N.J. 62 (1977), 376 A.2d 1169; *State* v. *Nash, supra* at 471; *Darrow* v. *Hanover Township,* 58 N.J. 410 (1971), 278 A.2d 200; *Johnson* v. *New Jersey, supra; State* v. *Koch,* 118 N.J. Super. 421 (App. Div. 1972), 288 A.2d 295. Thus, in New Jersey, as in the federal courts, competing considerations in each case are weighed by examining: (1) the purpose of the rule and whether it would be furthered by retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect retroactive application would have on the administration of justice, *Stovall* v. *Denno, supra* at 297 and *State* v. *Patino, supra.*

With respect to the first prong of the aforementioned test, it is evident that only prospective application should be given to the Court's decision in *Arkansas* v. *Sanders, supra.* The purposes of the exclusionary rule can in no way be advanced by giving retroactive application to new decisions in the law of search and seizure. The purpose of the exclusionary rule is, of course, to deter illegal police conduct and preserve judicial integrity. This objective can only be advanced by first informing law enforcement officers that certain conduct is illegal and, then excluding any future evidence which is obtained in violation of that prohibition. If the police gain evidence in a manner which they have reason to believe is acceptable and that evi- is suppressed due to a later change or clarification of the

law in that area, the only benefit will be to the criminal who is set free even though there is no doubt as to his guilt. Our society cannot gain since there could not possibly be any deterrent effect in such an application of the exclusionary rule. The exclusionary rule and the rules set forth in *Chadwick* and *Sanders* cannot be advanced by retroactive application. See, *United States* v. *Peltier,* 422 U.S. 531, 538-539 (1975); *State* v. *Howery, supra* at 8.

Thus application of the foremost of the above criteria, *i.e.,* the purpose to be served by the new constitutional precept, "strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule." *Desist* v. *United States, supra* at 249. As reiterated in the *Desist* opinion,

> all of the cases . . . requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. This misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved. *Id.* at 249, quoting *Linkletter* v. *Walker, supra* at 636.

Desist and its progeny [see *ante* and *infra*] rest their determination upon true understanding of the exclusionary rule. As emphasized, albeit in a somewhat different context, by the Court:

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."
>
> Linkletter v. Walker, 381 U.S. 618, 637, 85 S.Ct. 1731, 1742, 14 L.Ed.2d 601 (1965).

Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960).

Accord, Mapp v. Ohio, supra. 367 U.S. at 656, 81 S.Ct., at 1692; Tehan v. United States ex. rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed. 2d 453 (1966); Terry v. Ohio, 392 U.S. 1, 29, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968). In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. *United States* v. *Calandra,* 414 U.S. 338, 347-348 (1974).

In the matter herein, the intrusion into defendants' privacy interests emanating from the detention of his motor vehicle was *fait accompli;* the deterrent thrust of the exclusionary rule could thus in no way be advanced by the invalidation of police action taken in February 1979 through the invocation of constitutional rights unrecognized before March 1979.

Secondly, we note that New Jersey law enforcement personnel substantially relied upon this Courts' holdings in *Chambers* v. *Maroney, supra; Carroll* v. *United States, supra.* Constitutional limitations on the search of luggage seized with probable cause during a valid warrantless search of motor vehicles was not clearly established

until Sanders, *supra*. In the instant case on February 4, 1977, it is clear that the arresting officer relied substantially on cases such as *Carroll* v. *United States, supra* and *Chambers* v. *Maroney, supra* in searching the suitcase. Prior to the decision in *Chadwick* there was no reason to believe that suitcases were excepted from the automobile exception. See *State* v. *Smith,* 113 N.J. Super. 120 (App. Div. 1971), 273 A.2d 120; *State in the Interst of A.C.,* 115 N.J. Super. 77 (App. Div. 1971), 278 A.2d 225. Indeed, the Supreme Court in *Sanders* recognized that both courts and law enforcement officers have often found difficulty in applying previous Fourth Amendment decisions to individual cases. 99 S.Ct. at 2589. Based on the foregoing it is clear that law enforcement reasonably relied on the principles set forth in *Carroll* and *Chambers.* To hold police officers to a standard which this Court has found the lower courts unable to meet would be unreasonable.

It is also noteworthy that this Court, in *United States* v. *Peltier, supra* at 538, stated:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized instant manner. *Id.*

Thus, where as here, the arresting officer reasonably concluded that his conduct was in accordance with constitutional principles applicable at the time of the instant search, the "imperative of judicial integrity" noted in *United States* v. *Peltier, supra,* is not offended.

Finally, the State submits that retroactive application of *Chadwick* and *Sanders* would place significant burdens on the administration of justice. The courts would be bound to meet a great number of Fourth Amendment claims. Moreover, this burden would be even further increased if cases such as the one at bar were held to come within the *Chadwick* and *Sanders* decision. As this court is aware many automobile search cases were decided during the interim between the *Chadwick* and *Sanders* decisions. If each of these defendants are now allowed to raise this issue, without regard to whether or not it was raised at the suppression hearing, the courts' burden will be great indeed.

Application of the factors set forth in *Stovall* v. *Denno, supra,* leads to the inescapable conclusion that *Sanders* and *Chadwick* have no bearing on the case at bar. See, *United States* v. *Reda,* 563 F.2d 510 (1977), (holding *Chadwick* to be prospective only); *United States* v. *Berry,* 571 F.2d 2 (7 Cir. 1978) (on rehearing) *cert.* den. sub. nom. *Richardson* v. *United States,* 439 U.S. 840 (1978); *United States* v. *Calandrella,* 605 F.2d 236 (6 Cir. 1979); *United State* v. *Steward,* 595 F.2d 500, 503 (9 Cir. 1979); *Nastu* v. *State,* 589 S.W.2d 434, 26 Cr.L. 2117 (Tex. Ct. Crim. App. October 3, 1979); *California* v. *Minjores,* 24 Cal.3d 410, 591 P.2d 514, 153 Cal. Rptr. 224 (Sup. Ct. 1979), *cert.* den. —— U.S. ——, 62 L.Ed. 2d 117 (1979). *Kemner* v. *Texas,* —— S.W.2d ——, 25 Cr.L. 3196 (Texas Ct. of Crim. App. 1979). *State* v. *Kahlon,* 172 N.J. Super. 331, 341 (App. Div. 1980), —— A.2d ——; *United States* v. *Choate,* 576 F.2d 165, 182 n.20 (9 Cir. 1978), *cert.* den. 439 U.S. 953 (1978). But see, *United States* v. *Gooch Jr.,* 603 F.2d 122 (10 Cir. 1979); *United States* v. *Mackay,* 606 F.2d 264 (9 Cir. 1979); *United States* v. *Dien,* 615 F.2d 10 (2 Cir. 1980); and *United States* v. *Miller,* 608 F.2d 1089 (5 Cir. 1979), (holding that *Sanders* is retroactive to *Chadwick* only).

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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